Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1062

GERALD MARKHAM, aka JERRY J. D. MARKHAM,

Petitioner,

vs.

PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, and KENNETH C. KELLER, COUNSEL GENERAL OF CANADA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, and KENNETH C. KELLER, COUNSEL GENERAL OF CANADA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petitioner, GERALD MARKHAM, aka JERRY J. D. MARKHAM, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed August 7, 1979, and its order denying petition for rehearing and suggestion for rehearing *en banc*, filed October 9, 1979, which judgment affirmed the judgment of the United States District Court for the Central District of California which denied petitioner habeas corpus relief pursuant to Title 28 of the United States Code. Section 2241.

OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit was filed on August 7, 1979. A copy of that memorandum opinion appears in the appendix hereto as Appendix "A." No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 7, 1979. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order filed October 9, 1979. A copy of that order appears in the appendix hereto as Appendix "B." The Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254(1) and Rule 22(2) of the Federal Rules of Civil Procedure.

QUESTION PRESENTED

Whether the date a foreign country makes an extradition demand is the date utilized to determine which treaty to apply, rather than the date of the crime's commission?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 18 of the 1971 treaty of extradition between the United States and Canada provides, in part:

> "(2) This treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; except that the crimes listed in such agreements and committed prior to entry into force of this treaty, shall be subject to extradition pursuant to the provisions of such agreements." (T.I.A.S. No. 8237.)

STATEMENT OF THE CASE

The petitioner was charged on June 4, 1975 with violating the following laws of Canada:

> (a) Importing hashish, contrary to Section 5(1) of the Narcotics Control Act;
>
> (b) Possession with intent to traffic in hashish, contrary to Section 4(2) of the

Narcotics Control Act; and

(c) Conspiracy to import hashish, contrary to Section 423(1)(b) of the Canadian Criminal Code.

A trial was set for May 4, 1976, and petitioner and his co-defendant were released pending that trial. Petitioner had given the Canadian government both the Canadian address of a relative and his address within the United States. Petitioner failed to appear for trial on May 4, 1976, and a warrant for his arrest was issued.

Petitioner returned to the United States and lived at the address given to the Canadian government. He maintained a California Driver's License. On January 13, 1978, petitioner was issued a traffic violation by the Riverside Sheriff's Department. A record check revealed the Canadian arrest warrant, precipitating the filing of extradition proceedings.

On January 13, 1978, United States District Court Judge Laughlin E. Waters signed a complaint and issued a warrant for the arrest of petitioner. Petitioner was released on bond April 29, 1978.

On April 28, 1978, the United States District Court for the Central District of California, the Honorable Robert Firth presiding, ordered petitioner extradited. Judge Firth revoked petitioner's bond and ordered petitioner remanded to custody awaiting receipt of the surrender warrant from the Secretary of State.

On May 10, 1978, petitioner filed a Petition for Writ of Habeas Corpus. On May 17, 1978, United States District Judge Robert M. Takasugi set bail and petitioner is presently at liberty on bond.

On June 29, 1978, the Honorable Robert J. Kelleher denied petitioner's Petition for Writ of Habeas Corpus. A timely Notice of Appeal was filed July 3, 1978.

On July 5, 1978, attorney Wilfred Hearn, Assistant United States Attorney and Victor Sherman of Nasatir, Sherman & Hirsch, attorneys for petitioner, stipulated that "pending an appeal of the denial of the Petition for Writ of Habeas Corpus, further proceedings in the matter of extradition of GERALD MARKHAM, No. CV 78-1802-RJK are stayed until the Court of Appeals issues a ruling in this case." The stipulation was accepted by Judge Kelleher on July 12, 1978.

On February 12, 1979, the United States Court of Appeals for the Ninth Circuit dismissed the within appeal for lack of jurisdiction. The Ninth Circuit Court stated that "the District Court Judge indicated the later entry of a formal order when he announced his ruling. There is no such order." The Ninth Circuit Court went on to add that "Counsel, upon causing such an order to be filed, may renew the appeal by filing a new notice of appeal."

On March 8, 1979, a new Notice of Appeal was filed with the United States District Court for the Central District of California. The parties stipulated that the records and briefs would be transferred to a new number and the case would be submitted to the same panel on the briefs previously filed.

On August 7, 1979, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's ruling denying petitioner's Petition for Writ of Habeas Corpus. A timely petition for rehearing was filed and denied on

October 9, 1979. On November 14, 1979, the Ninth Circuit Court of Appeals ordered that the judgment be filed and spread. On November 26, 1979, petitioner filed a petition to recall the mandate and stay the mandate pending the filing of a Writ of Certiorari to the United States Supreme Court. This petition has not yet been ruled upon.

REASONS FOR GRANTING A WRIT

I

There Is Disagreement Between Various Circuit Courts of Appeals With Regard To Whether The Treaty Between The United States And Canada, Effective March 22, 1976, Is Retroactive In Application.

The United States Court of Appeals for the Ninth Circuit, by its opinion in this case, establishes a rule with regard to extradition proceedings that has far-ranging implications. The court determined that the date the foreign country makes an extradition demand is the date utilized to determine which treaty to apply, rather than the date of either the crime's commission or the indictment by the foreign government of the person for which extradition is sought.

This approach has been expressly criticized by the United States Court of Appeals for the Second Circuit in *Galanis v. Pallanck,* 568 F.2d 234, 239 (2d Cir. 1977).

Both this case and the Second Circuit case cited above deal with the treaty between the United States

and Canada enacted in 1971 which became effective on March 22, 1976. Article 18 of this treaty provides, in part:

> "(2) This treaty shall terminate and replace any extradition agreements and provisions on extradition and any other agreement in force between the United States and Canada; *except that the crimes listed in such agreements and committed prior to entry into force of this treaty shall be subject to extradition pursuant to the provisions of such agreements.*" (T.I.A.S. No. 8237.) (Emphasis added.)

The offense petitioner allegedly committed is said to have occurred on June 3, 1975. In fact, petitioner was charged on June 4, 1975. Therefore, the extradition treaty in force at the time the offense was committed was the previous extradition treaty and not the 1971 treaty.

This is precisely the issue the court dealt with in *United States v. Galanis,* 429 F. Supp. 1215 (D.C. Conn. 1977), holding that where the crime "charged was allegedly committed prior to the entry into force of the 1971 treaty . . . by the very terms of the treaty this proceeding is governed by the previous extradition treaty in force."

The United States Court of Appeals for the Second Circuit in *Galanis v. Pallanck, supra,* reaffirmed this holding, stating that "the prime objective of the language in Aritcle 18(2) of the treaty with Canada was to preclude such *ex post facto* designations of offenses as extraditable." 568 F.2d at 238.

The Ninth Circuit, in its opinion in the within case,

has failed to deal with the *ex post facto* implications of its present application of law.

In fact, almost identical language in the treaty between the United States and Spain (22 U.S.T. 737 T.I.A.S. 7136 [1971]) has likewise been interpreted in *United States v. Flores,* 538 F.2d 939 (2d Cir. 1976), to apply the treaty in effect when the offense was committed.

In *United States v. Flores, supra,* the defendant was indicted in the United States in 1973 for conspiracy to violate the narcotics laws between January 1, 1968 and April 30, 1971. Violations of narcotics laws were not extraditable offenses under the previous treaty. The High Court of Spain refused extradition for offenses committed prior to Spain's ratification of the new treaty, stating as follows:

> "The defense argument includes the statement that (during the period between January 6, 1968 and April 30, 1971) neither the treaty of 1904 nor the treaty of 1970, now in force, was applicable. With respect to the extradition treaty of May 29, 1970 between Spain and the United States of America, in force since June 16, 1971, that statement is correct, and therefore the objection based on the lack of retroactive effects of the said treaty is pertinent and admissible."

Thus, the attempt at extradition in November of 1973, after the treaty became effective, would not lie for offenses prior to ratification of the treaty.

Clearly, the most obvious ramification of the court's

opinion is the nullification of any proscription against *ex post facto* laws or provisions in any treaty.

The Ninth Circuit interprets Article 18 of the treaty between the United States and Canada as applying strictly to those offenses listed in the original 1842 treaty and inapplicable to any offense not listed in that original treaty. Yet, without a "clause to the contrary," treaties are assumed to be retroactive in application. Thus, the Ninth Circuit Court's opinion would allow countries to extradite United States citizens at any time in the future by merely adding an offense to a new treaty.

It is conceivable that a group of persons could become subject to extradition based upon a political whim. This strikes at the very heart of our constitutional prohibition against *ex post facto* laws. It is suggested that the issues described herein necessitate a clear explanation of this issue by the United States Supreme Court.

CONCLUSION

This petition presents fundamental issues regarding the application of extradition treaties between the United States and foreign countries. Currently, the United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the Second Circuit are using different standards in applying those provisions of the treaty of 1971 between the United States and Canada.

For this reason, it is respectfully requested that a

Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MICHAELINE ABATE RE
and
VICTOR SHERMAN of
NASATIR, SHERMAN & HIRSCH

Attorneys for Petitioner

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

CA NO. 79-2543

GERALD MARKHAM, aka J. D. MARKHAM, Petitioner/Appellant, vs. PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, and KENNETH C. KELLER, COUNSEL GENERAL OF CANADA, Respondents/Appellees.

[Filed August 7, 1979]

Appeal from the United States District Court
for the Central District of California.

Before: CHAMBERS, TANG, Circuit Judges, and TURRENTINE,* District Judge.

TURRENTINE, District Judge:

In 1975, petitioner Markham was arrested in Canada and charged with importation of hashish oil. Prior to trial, petitioner fled to the United States. While stopped for a traffic violation in California during 1978, the existence of a Canadian arrest warrant was discovered and extradition procedures were instituted. Markham sought habeas corpus relief pursuant to Title 28 of the United States Code,

*The Honorable Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

section 2241, contending that marijuana trafficking was not an extraditable offense within the meaning of the applicable treaty. Markham now appeals denial of habeas corpus relief.

The Webster-Ashburton Treaty of August 19, 1842, 8 Stat. 572 (1872), *as amended,* 44 Stat. 2100 (1925), between the United States and Canada, provides for the extradition of persons committing "[c]rimes and offenses against the laws for the suppression of the traffic in narcotics." In 1971 the Treaty was amended to specifically include, in the annexed schedule, marijuana-related crimes, 27 U.S.T. 983, 998,[1] and the amendment became effective in 1976.

Markham argues that this new provision, because effected after the alleged crime, should not apply. However, extradition in Markham's case began in 1978, well after the effective date of the amendment. This circuit has focused on the date of extradition demand to determine what treaty to apply, rather than the date of the crime's commission. *Cleugh v. Strakosch,* 109 F.2d 330, 335 (9th Cir. 1940).[2] In *Galanis v. Pallanck,* 568 F.2d 234, 239 (2d Cir. 1977), the Court of Appeals for the Second Circuit criticized this approach, and relied instead on

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[1]Item number 26 of the Schedule to the Amended Treaty includes "[o]ffenses against the laws relating to the traffic in, production, manufacture, or importation of narcotic drugs, Cannabis Sativa L., hallucinogenic drugs, amphetamines, barbiturates, cocaine and its derivatives." 27 U.S.T. 983, 988 (emphasis added).

[2]Thus it was held that when an extradition demand followed the effective date of a treaty, "[i]t [was] immaterial . . . that two of the nineteen crimes for which appellee's extradition [was] sought were committed before [the new treaty was in force.]." 109 F.2d 330, 335.

the date extradition proceedings actually commenced.[3] Regardless of which view is adopted, it appears that the date of the crime's commission, albeit before the effective date of the newly-amended Treaty, is irrelevant. Because both the Canadian extradition demand and proceedings followed the new Treaty, the amendment applies.

Markham further argues that the newly-amended Treaty, by its own terms, is supplanted by the original 1842 Treaty provisions. The general rule is that "extradition treaties, unless they contain a *clause to the contrary,* cover offenses committed prior to their conclusion." *Gallina v. Fraser,* 177 F. Supp. 856, 864 (D. Conn. 1959) aff'd, 278 F.2d 77 (2d Cir.), *cert. denied* 364 U.S. 851 (1960) (emphasis added). The 1976 newly-amended Treaty does contain a "clause to the contrary" (Article 18), but this clause is inapplicable to the facts in Markham's case. Article 18 provides:

> "(2) This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; *except* that the *crimes listed* in such agreements *and committed prior to entry into force* of this Treaty shall be subject to extradition pursuant to the provisions of such agreements." 27 U.S.T. 993, 995 (1976) (emphasis added).

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[3]In Galanis, both the crime's commission and the Canadian extradition demand came before the effective date of the amended Treaty. Nonetheless, the appellate court concluded that the fact that actual extradition proceedings began after the amendment was one reason for applying the new provisions.

Petitioner relies on this language for the sweeping proposition that the amendment is inapplicable to all crimes committed prior to 1976. However, Article 18 clearly dictates that the 1842 Treaty provisions must apply *only* to crimes which were (1) listed in or covered by that earlier Treaty, and (2) committed prior to 1976. In the instant case, only the requirement that the crime be committed prior to the date of the newly-amended Treaty has been satisfied. Therefore, because marijuana trafficking is not listed in the original 1842 Treaty, application of the newly-amended Treaty is not barred.

Having concluded that the 1976 amendment to the Webster-Ashburton Treaty does apply, it becomes unnecessary to consider whether, as Markham suggests, extradition would be improper under the original Treaty provisions. The Court has also reviewed petitioner's claims that his extradition would violate the Sixth Amendment right to a speedy trial, and the constitutional protection against discriminatory prosecutions and finds these contentions lacking in merit.

For the foregoing reasons we affirm the District Court's denial of Markham's petition for relief under Title 28 of the United States Code, section 2241.

APPENDIX "B"

ORDER DENYING PETITION FOR REHEARING

In the United States Court of Appeals for the Ninth Circuit.

No. 792543.

GERALD MARKHAM, aka J. D. MARKHAM, Petitioner-Appellant, vs. PETER J. PITCHESS, Sheriff of Los Angeles County, and KENNETH C. KELLER, Counsel General of Canada, Respondents-Appellees.

[Filed October 9, 1979]

Before: CHAMBERS and TANG, Circuit Judges, and TURRENTINE, District Judge.

The panel as constituted above has voted to deny the petition for rehearing. Judge Tang has voted to reject the suggestion for rehearing en banc and Judges Chambers and Turrentine have recommended rejection of the same.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

STATE OF CALIFORNIA)
) SS.
COUNTY OF ORANGE)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JANUARY 4, 1980, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Markham vs. Pitchess) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Solicitor General of the United States
Washington, D. C. 20530
3 copies

U. S. Department of Justice
Washington, D. C. 20530
1 Copy

United States Attorney
Central District of California
312 North Spring Street
Los Angeles, California 90012
3 copies

U. S. Court of Appeals
Ninth Circuit
U. S. Court of Appeals & Courthouse
Seventh & Mission Streets
San Francisco, California 94101
1 copy

U. S. District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012
1 copy

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY 4th 1980, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main Street, Huntington Beach, Ca. 92648
(714) 536-7161